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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term 1995

Ernest L. Akers, et al.

Petitioners

v.

Valfrid E. Palmer, et al.

Defendants

On the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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43 pp

QUESTIONS PRESENTED

Whether self-dealing by ERISA fiduciaries in establishing an employee stock ownership plan is insulated from review as a discretionary or settlor function?

What is the approriate standard for reviewing conduct by ERISA fiduciaries?

PARTIES

The parties in the proceeding in the Sixth Circuit included as appellants : Ernest L. Akers, W. E. Alexander, Michael N. Amsden, Lucian V. Angelo, Jerry Arndt, W. R. Arnold, John E. Arwood, Bobby Bennett, Quinelon M. Bennett, Howard L. Berryhill, Ray Ford Berryhill, Mark J. Bidwell, Thomas F. Bing, G. Brad Bogle, Jr., S. T. Booker, Richard L. Bouler, Hilton Bowen, Maurice E. Brewer, A. A. Brown, Robert Z. Brown, William N. Browning, Robert C. Brumfield, Robert E. Brumfield, A. J. Bruns, Ralph Cady, D. Russell Callahan, Jr., Joseph D. Carey, Joe D. Carpenter, John W. Cartwright, J. Mike Caruthers, Mike Case, Elijah P. Cleves, Jerry A. Clifton, Bennie R. Cook, Bidwell Cook, Zollie B. Cook, Michael P. Coley, Sr., Freddie G. Crain, James Crain, Robert C. Dortch, Stephen L. Dowdy, Sr., Carroll W. Drake, Carl Eaton, George Edmounds, Arthur L. Edwards, Floyd L. Edwards, John M. Eldred, Bobby R. Emerson, George M. Emerson, James C. Emerson, Harry H. Farris, Robert E. Fields, C. Wayne Fike, Richard N. Francis, Richard D. Fuller, A. T. Furniss, M. A. Gaines, Litdell Gales, O. K. Ghettie, W. Ghettie, Mary L. Glenn, Max W. Gosney, T. Eddie Gossett, John H. Greene, Stan R. Harper, Sr., Tommy L. Harper, John P. Harris, Larry P. Hatley, Sr., Eva M. Hawkins, Warren E. Hedge, Charles R. Henigan, Donny Hill, H. D. Hill, Terry B. Hill, Winford W. Hope, Jr., Percy J. Hughes, Herchell, D. Hunton, Johnny H. Hylander, William Incontro, D. Jaynes, Galen L. Jackson, Ronald T. Jaynes, Marlion T. Jaynes, Ronald T. Jaynes, Harold Jennings, David E. Johnson, George Patrick Johnson, Keith C. Johnson, Lincoln Johnson, Jr., Richard G. Johnson, Marcus Ladd, W. G. Lamb, Chuck L. Lancaster, Daniel M. Lane, Jerry Lashlee, Joe Lisa, Tim Lockman, W. A. Lockman, Boyd E. Logan, Jr., S. Lomax, John Looney, Lavoyd F. Luttrell, Arthur C. Mackey, Robert W. Marlow, Charles Maynor, H. McCall, W. T. McCallum, Jr., Phillip N. McCutcheon, B. A. McKim, E. McKinney, Harry McRae, Jamie B. McRae, J. W. Mitchell, Johney Moore, Birdie K. Morgan, M. Morris, A. L. Murphy, Billy J. Murphy, James B. Nease, William L. Newby, Robert D. Newsham, W. F. Nunnally, J. R. Olive, R. Pace, Wilford R. Pace, Richard Parvin, Edward Payne, Scott A. Peeples, Russell Phillips, William W. Phillips, Joe H. Pinegar, Sidney L. Porrier, W. Prince, Norman Pyles, Jack H. Raines, O. T. Randolph, Osker Rash, T. C. Riggs, Willie E. Roberts, Jr., Charles A. Robinson, Dallas J.

Robinson, J. F. Russell, Sr., Bill G. Ryan, Edward L. Sanders, Charlie Sargent, Vincent Neil Scalzo, Michael Robert Scott, R. Schultz, B. Segars, Johnny H. Shackelford, John C. Sharp, Sr., Daniel P. Shivers, E. M. Simpson, Jr., J. R. Simpson, Jr., Michael A. Sinowetski, Michael M. Sinowetski, Jr., Michael R. Sinowetski, Eugene Smart, Al Smith, Herbert J. Smith, Jr., J. C. Smith, J. S. Smith, Marlon R. Smith, William C. Stevens, Glenn A. Stinebaugh, Leonard L. Stoops, Richard Stoops, Edward Suchan, R. Swatzyna, Gerald E. Swiecicki, Sammy L. Taylor, Leandro F. Tenorio, Van R. Tyson, Jr., R. E. Vinson, James Walker, Ronnie L. Wallace, Paul T. Walton, Jr., Wilfred L. Ward, Sr., B. J. Weathers, C. White, Jr., Barry Whitehead, Clay Whitehead, D. J. Whitehead, William T. Whitehead, Robert A. Whitten, Clifford T. Wiggins, Billy J. Wilson, Don Wounch, and R. A. Wounch. The appellants in the Sixth Circuit are the petitioners.

The appellees in the proceeding below were Valfrid E. Palmer, Francis J. Comisky, Donald H. McKinnon, Eugene Callan, John Flynn, William Milanese, Edward Gold, Robert Fuller, Louis Ferrara, Kenneth Esterday, Ron Cole, M. Farkas, D. Daniels, the ALCO Gravure Industries, Inc. Employer Stock Ownership Plan, the ALCO Gravure Industries, Inc., Employer Stock Ownership Trust and ALCO Gravure Industries, Inc. The appellees in the Sixth Circuit were the defendants in the Unites States District Court for the Western Division of Tennessee.

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No.

Ernest L. Akers, et al.
Petitioners

v.

Valfrid E. Palmer, et al.
Respondents.

Petition for a Writ of Certiorari
to the United States Court Of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Ernest A. Akers, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The December 11, 1995 opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. at A-1) is reported at 71 F.3d 226 (6th Cir. 1995). This was a consolidated appeal from the United States District Court for the Western Division of Tennessee of two related cases: Ernest L. Akers, et al. v. Valfrid E. Palmer, et al. (Akers I) and Akers

v. Alco Gravure Industries, Inc., et al. (Akers II). The opinions of the district court (Pet. App. at A-11, A-13) are unreported.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit were filed on December 11, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

29 USC § 1104 (1) provides:

> . . .[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan; ....

STATEMENT OF THE CASE

This is a consolidated appeal from the United States District Court for the Western District of Tennessee of two related cases: ***Akers I*** (***Akers I***) and ***Akers v. Alco Gravure*** (***Akers II***). Both assert claims under the Employment Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461. These claims allege that in transactions involving the original purchase and sale of Alco Gravure Industries, Inc.

("Alco Industries"), management of Alco Industries who were also fiduciaries of Alco's employee stock ownership plan (ESOP), violated their fiduciary duties by the way they had structured their purchase of Alco Industries stock, the transfers of Alco Industries stock to the ESOP, and the ultimate sale of Alco Industries to Robert Maxwell.

After the Complaint in *Akers I* was filed, the defendants then answered. On November 5, 1991, all the defendants except Donald McKinnon filed a motion to dismiss, asserting that there were defects in the service of process on those defendants. On October 1, 1992, the lower court granted the motion, dismissing without prejudice as to all defendants except McKinnon.

The Complaint in *Akers II* was filed March 25, 1993. Complaint. The lower court granted a motion to dismiss, ruling that the complaint (which asserted claims essentially identical to those that had been asserted in *Akers I*) did not plead fraud with sufficient particularity and that any non-fraud claims were barred by ERISA's statute of limitations, which is shorter for non-fraud claims than for fraud claims.

McKinnon then filed a motion for summary judgment as to the sole remaining defendant in *Akers I*, asserting that any conduct by McKinnon was conduct establishing or terminating a ERISA trust (so-called settlor functions) and therefore not subject to ERISA's fiduciary standards. The lower court granted McKinnon's motion for summary judgment, accepting McKinnons's argument that his actions were settlor functions and therefore not the basis for a suit. Order Granting Summary Judgment, Pet. App. A-13. Judgment was entered on May 2,

1994, Judgment, Pet. App. A-11, and timely notices of appeal were filed on May 26, 1993.[1]

FACTS

Alco is a wholly-owned subsidiary of Alco Gravure Industries, Inc. (Alco Industries). Through a merger in May 1981, Alco Industries acquired a printing company owned by Macmillan, Inc., which eventually became Alco. Under Alco's purchase plan and as a condition to the financing, the primary financing bank required the company to form an ESOP. Accordingly, one month after the acquisition of Alco, the board established an ESOP through a written plan, the details of which were faithfully followed by an ESOP committee.

At the time of the purchase of Alco, its eleven founding members established the company by purchasing all of its 2,600 outstanding shares at $60 per share. The fair market value of the stock at the time of the purchase was somewhat over $10,000 per share. The stock to be acquired by the newly-formed ESOP was to be contributed based upon fair market value. An independent appraiser was to value the stock in compliance with the requirements of the Internal Revenue Code.

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[1] This procedural history lead the Sixth Circuit to conclude that this appeal only proceeds as to Defendant McKinnon. This conclusion was incorrect; the issue of whether there can be liability at all for Alco's fiduciaries resolved the entire appeal below, but if this Court were to review and reverse on the issue of violation of fiduciary obligations, it would then have to reverse and remand to the circuit court to consider whether the complaint sufficiently plead fraud.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ALLOW THE WRIT OF *CERTIORARI* TO RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO REVIEW OF SELF-DEALING BY ERISA FIDUCIARIES IN STRUCTURING ERISA PLANS

Alco was required by its lender to use an ESOP as a part of its financial structure. Under that structure, insiders who were fiduciaries of the ESOP were allowed to purchase stock at a price of $60 a share, while the shares transferred to the ESOP were based upon a value of over $10,000. The district court found no difficulty with this fact that the Alco founders/fiduciaries had a geometric return on their money, while the ESOP itself had a much lower return. The basic rubric under which the district court, and subsequently the Sixth Circuit, justified its lack of concern for this transaction was the notion of a "settlor function" – that self dealing by a fiduciary in establishing a trust is insulated from review.

This Court has long recognized that, by its terms, the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1101-1461 (ERISA) requires that the federal courts develop a body of federal trust law to govern the enforcement of rights under retirement plans:

> ERISA abounds with the language and terminology of trust law. See, e.g. 29 U.S.C. §§ 1002(7) ('participant'), 2002(8) ('beneficiary'), 1002(21)(A) ('fiduciary'), 1003(a) ('trustee'), 1104 ('fiduciary duties'). ERISA's legislative history confirms that the Act's fiduciary responsibility provisions, 29 USC §§ 1101-1114, 'codif[y] and mak[e] applicable to [ERISA]

> fiduciaries certain principles developed in the evolution of the law of trusts." HR Rep No. 93-533, p 11 (1973). Given this language and history, we have held that courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans." ***Pilot Life Ins v. Dedeaux***. ***See also Franchise Tax Board v. Construction Laborers Vacation Trust***, 463 US 1, 24 n. 26 (1983)("[A] body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.'") (quoting 129 Cong Rec 29942 (1974) (remarks of Sen. Javits)).
>
> -***Firestone Tire and Rubber Co. v. Bruch***, 489 U.S. 101, 110 (1989).

A basic goal of ERISA was to prevent fiduciaries from manipulating pension plans for their own purposes. In ***Massachusetts Mut. Life Ins. Co. v. Russell***, 473 U.S. 134, 141 n. 8 (1985), this Court quoted extensively from ERISA's legislative history to this effect, noting:

> The floor debate reveals that the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and that ERISA was designed to prevent these abuses in the future.

Abuses noted included 'management who manipulate them [the pension funds] for their own purposes...." *Id.* (quoting 3 Leg Hist 4811; 120 Cong Rec 29957 (1974)).

Manipulation of pension funds is prohibited by a central provision of ERISA: the requirement that the trustee act

"solely in the interest of the participants and beneficiaries and ... for the exclusive purpose of ... providing benefits to participants and their beneficiaries." 29 U.S.C. § 110-(a)(1)(A)(i). This provision has been referred to as the "sole interest" or "exclusive purpose" rule.[2]

The basic structure of the ERISA plan in the case at bar presents problems with regard to the sole interest and exclusive benefit rule. In the first place, the structure of an ESOP has been described as involving inherent difficulties with the exclusive benefit rule:

> The severe conflicts of interest that frequently arise when the ESOP trustees are representatives of management further highlight the tension between ESOPs and the exclusive benefit rule. In leveraged buy-outs involving ESOPs, for example, the ESOP trustees must decide how much the ESOP should pay for employer stock. Since the trustees typically represent (or are themselves) selling shareholders, the conflict of interest is intense.
>
> ESOPs, in short, are impossible to reconcile with the exclusive benefit rule. The tax subsidy associated with ESOPs may be valuable to the firm, but is in no way targeted to employees. Moreover, ESOPs create inefficient incentives, force workers to bear unnecessary

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[2] *See* Daniel Fischell & John H. Langbein, "ERISA's Fundamental Contradiction: The Exclusive Benefit Rule," 55 U. Chicago L. Rev. 1105, 1108 (1988) ("In ERSIA argo this "soley-in-the-interest / exclusive-purpose-of-[benefiting]" language of section 404(a)(1)(A) is compressed as the "sole interest / exclusive purpose" or sometimes simply the "exclusive benefit" rule.

> risk, and subject them to the perils of self-dealing transactions.
>
> -Daniel Fischell & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. Chi. L. Rev. 1105, 1156-57 (1988)

Beyond the tension just noted, the particular structure used in this case involved an additional tension: the fiduciaries' duties to act in the exclusive interest of the trust. The fiduciaries, as insiders or management of Alco, set up the leveraged buyout so that they could purchase stock at $60 a share, yet established an ESOP as a part of the buy-out transaction under which the ESOP was required to purchase its stock for market value, which was over $10,000 a share throughout Alco's history.

The circuit court and district court below premised their holdings on the notion that decisions made by the settlor with respect to the terms of the plan, and decisions about the amount and timing of contributions to a discretionary plan (decisions referred to as "settlor functions") are not subject to the same scrutiny as fiduciary decisions. Pet. App. At A-21, Order Granting Motion for Summary Judgment at 9. From the legal conclusion that a decision to amend or terminate a plan is not fiduciary, the district court concluded that rules governing fiduciary conduct (including prohibitions against self-interested transactions) do not apply to such a decision regardless of the fact that the decision was self-serving. The district court finally concluded, "The fact that...the Board of Directors made a geometric return on their original investment while the ESOP

trust merely doubled its money in the sale to Maxwell is not self-dealing or actionable under ERISA." Pet. App. At A-23, Order Granting Motion for Summary Judgment at 11.

The effect of the district court holding is to carve out of ERISA's prohibition against self-dealing an exception that makes self-dealing acceptable when the plan and its surrounding circumstances are designed to allow self-dealing. This holding is an extension of a defense earlier recognized by the Sixth Circuit; this defense insulated from review decisions establishing (or settling) an ERISA trust. Under this defense, "settlor functions" could not be challenged, and therefore the terms or funding of a trust were not subject to review. ***See Sutter v. BASF Corp.***, 964 F.2d 556, 562 (6th Cir. 1992) (decisions to merge two plans and not to restore lost service to noncontributing employees were business decisions not to be overturned "in the absence of violation of state or federal law."); ***Musto v. American General Corp.***, 861 F.2d 897, 911-912 (6th Cir. 1988), ***cert. denied***, 490 US. 1020 (1984) (employer's reservation of a right to amend a medical insurance plan is not "overreaching"); ***Moore v. Reynolds Metals Company Retirement Program for Salaried Employees***, 740 F.2d 454, 457 (6th Cir.), ***cert. denied*** 469 U.S. 1109 (1984) (requirement of a waiting period before a covered employee was determined to be totally and permanently disabled held insulated from review).

The settlor function defense as adopted by the Sixth Circuit has not been accepted by other circuits. The Tenth Circuit has rejected the argument that "recommending, designing, and implementing amendment of a profit-sharing plan

to an employee stock ownership plan" are not subject to "the fiduciary standards of § 404(a)." ***Eaves v. Penn***, 587 F.2d 453, 458 (10th Cir. 1978). The Tenth Circuit in ***Eaves*** went on to hold fiduciaries in an ESOP plan bound by the exclusive benefit rule. ***Id.*** at 459. The court stated that an acquisition "primarily to finance the employer...would not meet the exclusive benefit requirement." ***Id.*** (citing House Conf. Report No. 93-1280). The Ninth Circuit has also shown a willingness to review the structure of an ERISA plan where there is evidence of self-dealing. ***See, e.g. Amalgamated Clothing & Textile Workers Union v. Murdock***, 861 F.2d 1406 (9th Cir. 1988) (ordering alteration of a plan and disgorgement of profits from fiduciary due to self-interest by fiduciary). In ***Amalgamated Clothing***, relief was awarded involving the re-drawing of the terms of the plan, and the setting aside of business decisions because of violations of federal law—the duty of loyalty codified in ERISA.

The settlor function defense would allow fudiciaries to hide behind the terms of the plan to avoid liability for self-dealing. This approach was specifically rejected by the Ninth Circuit in ***Amalgamated Clothing & Textile Workers Union v. Murdock***. ***Amalgamated*** also holds that where an ERISA fiduciary profits from transactions involving the trust, a participant (or former participant, if the trust has been terminated) may sue to force the fiduciary to disgorge those profits.

Defendant David Murdock had been a plan fiduciary at a time when he had also been involved in the purchase of two other corporations' stock as part of an effort to "greenmail"

those corporations. *Id.* at 1408. The plan participated in the purchases of the two corporations' stock and profited from these transactions. Later, the plan was amended so that any funds in the plan in excess of actuarial requirements would revert to the plan sponsor on termination. Murdock, stepping into the shoes of the plan sponsor, terminated the plan, paid the participants the funds they were actuarially due, and then took the surplus, which included several million dollars attributable to the greenmail transactions. *Id.* at 1408-09.

A suit to force Murdock to disgorge these profits was dismissed on a Fed.R.Civ.Pro. 12(b) (6) motion, on the grounds that the plan had been terminated (making the plaintiffs no longer participants), and because the amendment and termination were not breaches of fiduciary duty. *Id.* at 1409. The Ninth Circuit reversed, holding that, because Murdock was acting partly out of self-interest while acting as a fiduciary, he could not retain the profits.

The court relied heavily on common law trust principles and emphasized that there was no necessity of injury to the ERISA plan:

> [W]hen a trustee breaches his duty of loyalty, the beneficiary may bring suit to recover any profits made by the trustee through the breach of his duty to the trust. *See* [Restatement (Second) of Trusts] § 205(b) comment (h), § 206 comment (j). ...
>
> The purpose behind this rule is to deter the fiduciary from engaging in disloyal conduct by denying him the profits of his breach. G.

> Bogert and G. Bogert, ***The Law of Trusts and Trustees***, § 543, at 218 (2d ed. 1978). If there is no financial incentive to breach, a fiduciary will be less tempted to engage in disloyal transactions. ***Id.*** The purpose of this rule is not to make beneficiaries whole for any damages they may have suffered. **In fact, whether beneficiaries have been financially damaged by the breach is immaterial**. G. Bogert & G. Bogert, ***supra***, § 543, at 217. Rather, the objective is to make "disobedience of the trustee to the [duty of loyalty] so prejudicial to him that he and all other trustees will be induced to avoid disloyal transactions in the future." ***Id.*** at 218.
>
> -***Amalgamated Clothing***, 861 F.2d at 1411-1412 (emphasis added).

The court then went on to impose a constructive trust on Murdock's profit, rejecting the defense argument that Murdock would have been able to obtain the profit under the terms of the plan (which paid the actuarial surplus to Murdock, a plan provision that, but for the self-dealing, would have not in itself been a breach of fiduciary relations). ***Id.*** at 1417.

In ***Amalgamated Clothing,*** the Ninth Circuit refused to allow settlor functions—the establishment of the terms of the trust—to be insulated from review because the fiduciaries had engaged in self-dealing. The rule applied this case by the Sixth Circuit below stands in opposition to that holding.

In addition to a division among the circuits as to the application of fiduciary standards to review of the structure of a plan, there is confusion about whether injury to the trust must be shown. The Seventh and Ninth Circuits have held that,

where breach of fiduciary duty is shown, the fiduciaries are to be required to disgorge any benefit of that breach. ***Amalgamated Clothing & Textile Workers Union v. Murdock,*** 861 F.2d 1406, 1418 (9th Cir. 1988); ***Leigh v. Engle***, 727 F.2d 113 (7th Cir. 1984), ***cert. denied, Engle v. Estate of Johnson***. The Tenth Circuit requires a showing of injury in the form of a loss to the plan. *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 919-20 (8th Cir. 1994). In their emphasis on the profit made by the ESOP in the ultimate sale of Alco, the District Court and the Sixth Circuit alligned with ***Roth***; one of the principles undergirding the decisions below is the notion that a self-dealing transaction is acceptable where the ESOP makes a profit. The Ninth Circuit's analysis in *Amalgamated Clothing* would produce a different result: The fact of self-dealing mandated that the self-dealing fiduciary disgorge the benefit they obtained from the transaction.

CONCLUSION

For the reasons stated herein, the writ of ceriorari should issue to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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App. 1
1995 FED App. 0355P (6th Cir.)
File Name: 95a0355p.06

Nos. 94-5740/5743

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ERNEST L. AKERS, et al.,
Plaintiffs-Appellants,

v.

VALFRID E. PALMER;
ALCO GRAVURE INDUSTRIES, INC., et al.,
Defendants,

DONALD H. MCKINNON,
Defendant-Appellee.;

ON APPEAL from the United States District Court
for the Western District of Tennessee

Decided and Filed December 11, 1995

Before: LIVELY, RYAN, and SILER, Circuit Judges.

RYAN, Circuit Judge. This is a consolidated appeal of two cases brought under the fiduciary provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1104 and 1106(b) (ERISA). Plaintiffs challenged certain corporate board actions leading to the creation and initial funding of an Employee Stock Ownership Plan (ESOP) for the benefit of the employees of Alco Gravure, Inc. (Alco). Plaintiffs claimed that Alco's founding board members engaged in self-

dealing by purchasing all of the company's outstanding shares of common stock at a price well below the stock's market value, while making the initial contributions to the ESOP with shares at their fair market value. Plaintiffs characterized the initial funding decision as a breach of fiduciary duty under ERISA, because when the company was sold some seven years after its creation, the founding stockholders made a substantial profit on their investment, while the ESOP only doubled its money.

The district court granted summary judgment against plaintiffs for failure to state a claim under ERISA, because the transactions challenged were not fiduciary acts covered by the statute. We agree, and for the reasons explained below, we **AFFIRM** the district court's judgment.[1]

I.

This case arose as a result of the sale of Alco to Maxwell Communications, Inc. on January 12, 1988. Alco is a Delaware Corporation which was organized in March 1981. Its eleven founding members established the company by purchasing all of its 2,600 outstanding shares at $60 per share. It appears that the fair market value of the stock at the time of the purchase was somewhat over $10,000 per share.

Alco is a wholly-owned subsidiary of Alco Gravure Industries, Inc. (Alco Industries). Through a merger in May 1981, Alco Industries acquired a printing company owned by

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[1] Plaintiffs also appealed the district court's dismissal of their complaint for failure to plead fraud with particularity, and the court's denial of relief from judgment under Fed.R.Civ.P. 59(e). Because we find that plaintiffs failed to state a claim under ERISA, we need not address the procedural issues before this court.

Macmillan, Inc., which eventually became Alco. Under Alco's purchase plan and as a condition to the financing, the primary financing bank required the company to form an ESOP. Accordingly, one month after the acquisition of Alco, the board established an ESOP through a written plan, the details of which were faithfully followed by an ESOP committee.

The exclusive source of contributions to the new ESOP was to be newly-issued Alco stock priced at its fair market value. An independent appraiser was to valuate the stock in compliance with the requirements of the Internal Revenue Code. The fair market value of Alco shares at the time of the creation of the trust was over $10,000 per share.

A written agreement set forth all of Alco's rights and obligations with respect to the ESOP. The relevant sections state:

> 1) Section 4.02: Employer Contributions may be paid to the Trustee in such amounts . . . as may be determined by the . . . Board of Directors . . . . [There is no requirement of notification to beneficiaries under the plan of the amount, if any, of contribution]. . . .
>
> 2) Section 5.04: The Committee may direct the Trustee to sell or resell shares of Company Stock to any person [for no less than the shares' fair market value] . . . .
>
> 3) Section 11.05: This Plan will be administered by a Committee composed of three (3) individuals . . . appointed by the Board of Directors . . . .
>
> 4) Section 12.03: The Company shall have the right at any time to terminate the Plan and the Trust created concurrently herewith . . . .

Historically, the board decided, after the close of the company's fiscal year, whether to make contributions to the ESOP. The result was that the decision whether to contribute for the previous year was not made until February of the following year.

Alco made the first contribution to the ESOP in February 1982; it contributed 288 shares valued at $2,491,200. The company continued making contributions to the trust every year through 1986, but it made no contributions to the plan for the year 1987. Alco was sold to Maxwell Communications in 1988 and the company terminated the ESOP as a condition of the sale.

Plaintiffs originally brought their claim against Alco, its Board of Directors, and certain of its shareholders. All the defendants, except Donald McKinnon, were dismissed for failure to serve process or because the statute of limitations expired. Plaintiffs did not appeal this decision of the district court. Thus, the only remaining defendant for purposes of this appeal is McKinnon, a founding board member of Alco and a former member of the ESOP Committee.

The district court granted defendant McKinnon's motion for summary judgment because it concluded that in creating, funding, and/or terminating the ESOP, defendants were not acting in a fiduciary capacity. The court found that settlor functions are not covered by ERISA, and that the Act does not apply to business decisions to amend or terminate a plan.

II.

This court reviews a grant of summary judgment *de novo* using the same test used by the district court. *Brooks v. American Broadcasting Cos.*, 932 F.2d 495, 500 (6th Cir. 1991). Summary judgment is proper when in viewing all the

evidence in the light most favorable to the nonmoving party, the court concludes that there are no genuine issues of material facts and therefore the moving party is entitled to judgment as a matter of law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc.*, 862 F.2d 597, 601 (6th Cir. 1988).

III.

We confess to being unable to understand the precise legal theory of the plaintiffs' claim. Ernest Akers challenges the initial funding of the ESOP with shares that were appraised at their fair market value by an independent appraiser. It appears that plaintiffs' contention is that the board of Alco should have funded the ESOP with shares valued at $60 per share, rather than at their market value of $10,000 per share. Indeed, Akers argues that it amounted to self-dealing, and thus a breach of fiduciary duty under ERISA, for the founders to have made a "geometric" return on their investment, while the ESOP "merely doubled its money." He makes this argument in the context of the sale of Alco seven years after the company's establishment of an ESOP. No matter how framed, plaintiffs' arguments failed to state an actionable claim under ERISA.

ERISA is designed to accomplish many worthwhile objectives, but the regulation of purely corporate behavior is not one of them. Rather, ERISA is a comprehensive, complex remedial statute designed to "protect . . . the interests of participants in employee benefit plans and their beneficiaries, . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). Its underlying purpose is the "'enforcement of strict fiduciary standards of care in the *administration* of all aspects of pension plans and promotion of the best interests of participants and

beneficiaries.'" *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1162 (6th Cir. 1988) (emphasis added) (citation omitted). In this case, there is no allegation that Alco breached its duties to the beneficiaries in its administration of the ESOP.

Both in its brief and at oral argument, plaintiffs asserted that Alco breached its fiduciary duty by "causing the ESOP to purchase" stock at its fair market value, rather than at the favorable rate of $60 per share. We find this argument strained, disingenuous, and wholly meritless. The ESOP did not "purchase" anything, and plaintiffs offered no evidence other than their own assertions to support their claim. Rather, the shares transferred to the fund served as an initial contribution, giving the ESOP benefits worth over $2,400,000. The trust acquired no debt to obtain the shares, nor were there any plan "assets" used to "purchase" the shares. To be sure, the shares themselves constituted the original plan assets. They were, in essence, a gift from the employer to the employees.

Plaintiffs would have this court apply ERISA to company actions *prior* to the creation of an employee benefit plan. We have found no authority, nor have plaintiffs offered any, to support such an extension of ERISA. Not every decision affecting a benefits plan is subject to ERISA's fiduciary rules. *Bryant v. Food Lion, Inc.*, 774 F. Supp. 1484, 1491 (D.S.C. 1991). Because an employer has no affirmative duty to create a benefits plan for its employees, *Moore v. Reynolds Metals Co. Retirement Program*, 740 F.2d 454, 456 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985), only actions respecting the *administration* or *management* of plan "assets" are subject to fiduciary standards. *See Musto v. American General Corp.*, 861 F.2d 897, 911 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989). That is, a company is only subject to fiduciary restrictions when managing a plan according to its terms, but not when it decides what those terms are to be. *Id.* ERISA is simply not involved in regulating conduct affecting

the establishment of a plan or with its terms. *Moore*, 740 F.2d at 456. "In particular, courts have no authority to decide which benefits employers must confer upon their employees . . . ," *id.*, or to review a plan's provisions for reasonableness. *Sutter v. BASF Corp.*, 964 F.2d 556, 562 (6th Cir. 1992). Rather, these decisions should be left to the marketplace or to federal legislation. *Moore*, 740 F.2d at 456. Simply put, "'ERISA's concern is with the elements of a plan and its administration *after* it has been established . . . .'" *Musto*, 861 F.2d at 912 (emphasis added) (citation omitted).

Additionally, plaintiffs' assertions that the ESOP should have been funded with shares valued at $60 would also require this court to pass on the level of benefits conferred upon Alco employees. Manifestly, we have no authority to do so. *Moore*, 740 F.2d at 456. The reasonableness of terms comprising an ESOP is left solely to the discretion of the employer. *See Sutter*, 964 F.2d at 562. Congress chose to carve out a range of transactions in which the employer may engage without being subject to ERISA liability; the creation of a trust fund and the designation of level of benefits are two of those transactions. Whatever Tennessee corporate law might have to say about the type of transaction involved in the purchase of Alco might be an interesting topic for exploration; however, it is neither the purpose nor the domain of ERISA to regulate purely corporate behavior that is adequately covered elsewhere.

Plaintiffs characterize the actions of Alco's board as fiduciary because the board benefited itself "at the expense" of the trust beneficiaries. This characterization is erroneous both in law and in fact. To state that someone is a fiduciary is a legal conclusion to be determined by a trier of fact. That McKinnon was a founding member of Alco and that he voted to create an ESOP with 288 shares valued at their fair market value does not make him a fiduciary. A party does not become a fiduciary simply by a litigant's assertion that this is the case. The scope of

ERISA's fiduciary duties is outlined in sections 1104 and 1106, which provide in relevant part:

> (a)
>
> > (1) . . . [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--
> >
> > > (A) for the exclusive purpose of:
> > >
> > > > (i) providing benefits to participants and their beneficiaries; and
> > > >
> > > > (ii) defraying reasonable expenses of administering the plan;
> > >
> > > (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man . . . would use in the conduct of [a similar] enterprise . . . ;

§ 1104(a)(1). These provisions encompass a "carefully tailored law of trusts." *Eaves v. Penn*, 587 F.2d 453, 457 (10th Cir. 1978). Section 1106, in turn, prohibits certain transactions between a plan and a party in interest or a fiduciary.

In turn, section 1002(21)(A) defines a fiduciary as one who "exercises any discretionary authority or . . . control respecting management of [a] plan, or . . . disposition of its assets"; and who "has any discretionary authority or . . . responsibility in the administration of [a] plan." 29 U.S.C. § 1002(21)(A)(i), (iii).

In concluding that the defendant was not a fiduciary as that term is defined in section 1002(21)(A) of ERISA, the

district court found that McKinnon did not sell anything to the ESOP, and did not use any trust "assets" for his own benefit. Indeed, when the board voted to acquire shares at $60 and to establish an ESOP, by definition, the ESOP had no assets -- the plan did not exist. In fact, it would not be created until at least one month after the acquisition of Alco. Thus, plaintiffs' characterization of the board's actions as self-dealing based on ESOP assets and beneficiaries' interests in those assets is plainly inaccurate.

Alco's decision to establish an ESOP and to fund it with newly-issued stock was the act of a settlor, immune from scrutiny under Title I of ERISA. This is the case even where there are conflicts between the employer's interests and those of the potential beneficiaries. Competing concerns will always arise between the creators of a plan and the interests of potential beneficiaries. However, "[i]f these competing concerns give rise to a fiduciary duty, . . . the distinction . . . the law makes between settlor and fiduciary functions would be obliterated . . . ." *Bryant*, 774 F. Supp. at 1493.

It is therefore perfectly consistent for an employer to wear "two hats" and act both as a fiduciary and as an employer without breaching fiduciary duties. "ERISA does not require that day-to-day corporate business transactions, which may have a collateral effect on prospective, contingent employee benefits, be performed solely in the interest of plan participants." *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990) (internal quotations and citations omitted).

The cases plaintiffs cite to support their position are simply inapposite. Most of the cases concern transactions involving an already established trust fund governed by ERISA. Others involve purely corporate law concepts of self-dealing and breach of fiduciary duty to the shareholders of a

corporation. Plaintiffs advance no authority justifying extending ERISA fiduciary standards to govern the conduct of a company in its decision as to whether and on what terms it should create an employee benefit plan.

Finally, because plaintiffs collapse the sale of the ESOP shares to Maxwell Communications in 1988 into the purchase of Alco in 1981, it is unclear under what theory they allege that the termination of the ESOP was a breach of fiduciary duty. Regardless, ERISA's fiduciary restrictions are also inapplicable to Alco's decision to terminate the ESOP. This is considered to be a "pure business decision." *See Sutter*, 964 F.2d at 562; *see also Adams*, 905 F.2d at 947. Alco's board explicitly reserved to itself the discretion to direct the trustee of the ESOP to sell the plan's shares when necessary. That the founders made a "geometric" return on their investment is irrelevant. A "company . . . is entitled to determine without judicial interference the amount of money it desires or can afford to appropriate," if any, to an employee benefit plan. *Moore*, 740 F.2d at 456 n.3. An employer may thus unilaterally terminate a plan governed by ERISA without violating the Act. *See Adams*, 905 F.2d at 948.

IV.

We conclude that none of the actions of which plaintiffs complain is a fiduciary act under ERISA. Because the decision to create an ESOP and fund it with newly-issued stock is a settlor function, and because the decision to terminate the plan was purely a business decision, the plaintiffs failed to state an actionable claim under ERISA, and therefore McKinnon is entitled to judgment as a matter of law. We therefore **AFFIRM** the district court's judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ERNEST L. AKERS ET AL.,
Plaintiffs, **JUDGMENT IN**
A CIVIL CASE

v. **Case No.**
91-2054 HBro

VALFRID E. PALMER, ET AL.
Defendants

(Filed May 3, 1994)

Decision by Court. This action came to consideration before the Court. The case has been decided on the defendant's motion for summary judgment, which was granted.

IT IS SO ORDERED AND ADJUDGED THAT IN COMPLIANCE WITH THE ORDER OF DISMISSAL, THE CASE IS HEREIN CLOSED.

APPROVED:

/s/ Odell Horton
ODELL HORTON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

May 2, 1994
Date

ROBERT R. DI

TROLIO (stamp)

Clerk

/s/ V. LaFon
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ERNEST AKERS, et. al.,
Plaintiffs

v. Civil Action No. 91-2054 HB

VALFRID E. PALMER, et al.,
Defendants

ORDER GRANTING DEFENDANT DONALD MCKINNON'S MOTION FOR SUMMARY JUDGMENT AND CLOSING CASE

The sole remaining defendant in this action, Donald H. McKinnon, has filed a motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. The plaintiffs, who are former participants in an employee stock ownership plan, claim that the defendant McKinnon violated the Employee Retirement Income Security Act of 1974 ("ERISA"), Sections 404 and 460 (b) (1) and (2). For the following reasons, the Court concludes that the defendant McKinnon is entitled to summary judgment as there are no genuine issues of material fact and summary judgment is proper as a matter of law.

Procedural History

This action was originally filed as two separate actions and consolidated into one, as the allegations in both were identical. The first of these two cases, Akers, et al. v. Palmer et al., Case No. 91-2054, was filed on January 14, 1991 ("Akers I"). In Akers I, the plaintiffs, who are former employees of Alco Gravure, Inc. ("Alco") asserted claims for violation of Sections 404 and 406 (b) (1) and (2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), codified at 29 U.S.C. §§ 1104 and 1106 (b) (1) and (2), against Mr. McKinnon and the other members of the Alco Industries Board of Directors, Alco, Employee Stock Ownership Plan ("ESOP"), the ESOP Trust, and other individuals who were significant stockholders in Alco.

The claims in this litigation arise from the January 12, 1988, sale of Alco Industries to Maxwell Communications, Inc. ("Maxwell") A condition of the sale of Alco to Maxwell was the termination of the ESOP Plan and Trust. No contribution to the ESOP was made in 1987. The suit alleges that McKinnon and the other shareholders fraudulently schemed that the Board of Directors of Alco ("Board") would not make a contribution to the ESOP Trust in 1987 so that McKinnon and the other shareholders would not decrease their proportion of the sale price to the company. The plaintiffs allege that McKinnon owed a fiduciary duty to the ESOP Trust when he acted as a member of the Board, and the Board declined to make the contribution. Their claim is that his breach of his alleged fiduciary duty violated ERISA and that he engaged in self-dealing, which also violated ERISA. The defendants, except for Donald McKinnon, were eventually dismissed to failure to serve process. Before most defendants in Akers I were dismissed, discovery was commenced and documents were produced which were reviewed by plaintiff's counsel.

The second action was filed March 25, 1993, Akers v. Alco Gravure Industries Inc. (Case No. 93-2288 HB) ("Akers II"), which basically alleged identical causes of action as Akers

I. On April 8, 1993, the plaintiffs amended their complaint; however, no new allegations were alleged from the original claims. The defendants filed a motion to dismiss the amended complaint for failure to state a claim under ERISA and for duplicating the claims in Akers I. The plaintiffs responded to the motion and asked to amend their complaint one more time.

One July 16, 1993, the defendants consented to the plaintiff's proposed amendments and withdrew the outstanding motion to dismiss. No amended complaint was ever served on the defendants, and in August 1993, the defendants renewed their motion to dismiss. The Court granted to defendants' motion to dismiss as the plaintiffs' claim was barred by the statute of limitations. However, the Court in November of 1993 reinstated Akers II as to Mr. McKinnon as he had been served in Akers I; therefore, the limitations period had been tolled for him only. The November 1993 order consolidated both cases "as concerning identical questions of law and fact."

Findings of Fact

The following issues are not in dispute. Alco Industries is a Delaware corporation which was organized in 1981. In April 1981, 2600 shares of common stock, constituting all outstanding stock of the corporation, were sold to eleven founding individuals, at $60 per share. Donald McKinnon was one of the founding individuals. Alco is a wholly-owned subsidiary of Alco Industries, Inc. Through a merger on May 13, 1981, Alco acquired a printing company subsidiary of Macmillan, Inc.

In 1981, Alco Industries and Alco established an ESOP Plan and ESOP Trust as a stock bonus plan for employees. Virtually all employees of the Macmillian subsidiary after the merger with Alco were eligible participants in the ESOP. The particulars of the ESOP Plan and Trust were embodied in

separate written instruments. The specific provisions relevant to the present litigation include:

(a) Under Section 12.03 of the ESOP Plan, Alco Industries had the right to terminate the ESOP at any time.

(b) Section 11.05 of the ESOP Plan provided that the Plan would be administered by a committee comprised of individuals appointed by the Board of Directors. Under Section 5.04 of the ESOP Plan, the ESOP Committee had the authority to direct the Trustee to sell shares of Alco stock.

(c) Under Section 4.02 of the ESOP Plan, the funding of the ESOP was made by discretionary employer contributions. There was no requirement under the ESOP Plan that the employer make any contribution to the ESOP. The decision to contribute to the ESOP in any particular year was made by Alco, or more specifically, by its Board of Directors. There was no requirement that the Board advise participants in the Plan what action the Board intended on taking with regard to the amount to be contributed to the ESOP, if any

(d) Under Section 4.03 of the ESOP Plan, no participant was allowed to make any contributions to the Plan.

Contributions were made to the ESOP Plan for the years 1981 through 1986. The source of the contribution was newly-issued Alco Industries stock, the number of shares determined by a valuation of their fair market value made by an independent appraiser according to the requirements on the Internal Revenue Code and Revenue Ruling thereunder. The contributed shares were the only Alco Industries stock held by the ESOP Trust.

Historically, the Board decided whether to make a contribution to the ESOP after the close of the Alco Industries fiscal year. Any decision to contribute for the previous year would be made in February of the following year. Alco Industries showed an operating profit for the years between 1981 and 1986. Alco Industries certified financial statement for 1987, prepared by Arthur Anderson & Company, showed a loss for the year 1987 of $518, 112. The plaintiff disputes that Alco Industries lost money in 1987 and has submitted an Exhibit J

(Alco Industries' Internal Financial Statement for 1987) in his response to the motion for summary judgment which purports to show that Alco Industries did show a profit for 1987. While this appears to be an issue of fact, the Court concludes that this discrepancy is not a genuine issue of fact which would preclude summary judgment.[1]

The Board did not make a contribution to the ESOP Trust for 1987. In 1987, Maxwell Communications made an offer to purchase all of the outstanding capital stock of Alco Industries from its shareholders. The management at Alco Industries was in favor of the sale and negotiated with Maxwell for the highest possible price. One of the conditions of the sale was that upon closing, the ESOP Plan and Trust be terminated so that there would be no minority stockholder remaining.

A letter of intent was entered into with Maxwell at the end of October 1987 contemplating a closing prior to December 31, 1987. On October 30, 1987, Valfred Palmer, who was at that time President of Alco Industries, issued a memorandum to all employees at Alco informing them of the proposed purchase by Maxwell and the reasons why the proposal was being considered. At the time the memo was issued, McKinnon was a

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[1]A fact is "material" only if its resolution "might affest the outcome of the suit under the governing law" and "factual disputes that are irrelevant or unecessary will not be counted." Anderson v. Liberty Lobby, Inc., citing 10A C Wright & A. Miller, Federal Practice and Procedure, Section 2725. pp. 93-5 (1983); See e.g., Kindermann v. General Motors Corp., 1990 U.S. Dist. LEXIS 18941 (E.D. Mich. 1990) (Friedman, J.), citing Degan v. Ford Motor Co., 869 F. 2d 889, 894-5 (5th Cir. 1989) (where there is no dispute as to the terms of a written employee benefit plan as governed by ERISA and the employer's compliance with the plan, the parties' dispute concerning parol evidence submitted to alter the terms of such plan is immaterial and will not preclude summary judgment).

member of the Board of Directors of Alco Industries along with Valfred Palmer, Francis Comiskey, Jr., Eugene Callan, and William Flynn. Messrs. Callan and Flynn were outside directors and did not own any Alco Industries stock. The ESOP Committee at that time was comprised of McKinnon, Palmer, and Comiskey. Those three resigned on November 5, 1987, and were replaced by Messrs. Callan and Flynn.

As sole members of the ESOP Committee, Messrs. Callan and Flynn engaged separate legal counsel and retained A.G. Edwards & Sons, an independent investment banker, to evaluate the fairness of Maxwell's offer. The opinion of A.G. Edwards was that the price that Maxwell had offered was fair; that the offer was more than double the fair market value of the shares. Based upon that opinion, and in accordance with the provisions of the ESOP Plan, the ESOP Committee instructed the Trustee to accept the offer of Maxwell and sell to it all of the Alco Industries stock owned by the ESOP Trust.

On December 15, 1987, Palmer issued a memorandum addressed to Alco's employees (including the plaintiffs) informing them that agreement was reached on all major open items in the sales contract with Maxwell and that the sale of the stock was scheduled to take place during the first week of January. At no time was any corporate action taken resulting in the sale which required a vote of the stockholders. Each stockholder of record made his own determination whether to sell his shares to Maxwell. At no time was there any issue presented to participants in the ESOP for their vote with respect to the sale to Maxwell, nor was there any action taken which would require their consent.

The sale to Maxwell by every single stockholder of Alco Industries (including the ESOP Trust) was consummated effective January 12, 1988. Each shareholder in Alco Industries received precisely the same amount for his shares ($23,311 per share). In January 1988, the ESOP was formally terminated in accordance with its terms. The ESOP Trust thereafter distributed to all the participants, including the plaintiff, their

pro-rata share of the proceeds of the sale of the ESOP Trust's stock to Maxwell Communications, Inc.

Summary Judgment Standard

The standard governing the decision on a motion for summary judgment are well-established. Summary judgment is appropriate only when there is no genuine issue of material fact, and the moving party is entitled to summary judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986); Street v. J.C. Bradford & Co., 886 F. 2d 1472, 1476-80 (6th Cir. 1989). The party seeking summary judgment bears the initial burden of showing a genuine absence of dispute concerning a material fact. Celotex, 477 U.S. at 323. Upon meeting this burden, the burden shifts to the nonmoving party, who cannot rest on its pleadings but must present some "specific facts showing that there is a genuine issue for trial." Id. at 324. A dispute about a material fact is "genuine" within the meaning of Federal Rule of Civil Procedure 56 only if "evidence is such that a reasonable jury could not return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 S. Ct. 2505, 91 L. Ed. 202 (1986). "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient." Id. at 252. The court is to construe the evidence and all the inferences to be drawn from it in the light most favorable to the nonmoving party. Id. at 255.

Applicable ERISA Law

The plaintiffs' claim that the defendant McKinnon violated Employee Retirement Income Security Act of 1974 ("ERISA") Section 404 and 406 (b) (1) and (2). The former

section defines the duties of and ERISA fiduciary, and later subsections list prohibited transactions between and ESOP Plan and its fiduciaries.

In the Sixth Circuit, "a company does not act in a fiduciary capacity when decided to amend or terminate a welfare benefits plan." Adams v. Avondale Industries, Inc., 905 F. 2d 943, 947 (6th Cir. 1990); cert denied, ___ U.S. ____, 111 S. Ct. 517, 112 L. Ed. 2d 529 (1990) (citing Musto v. American General Corp., 861 F. 2d 897, 911 (6th Cir. 1988), cert denied 490 U.S. 1020, 109 S. Ct. 1745, 104 L. Ed. 2d 182 (1989)). In the context of a pension benefits plan, "absent a violation of federal or state law, a federal court may not modify a substantive provision of a pension plan." Moore v. Reynolds Retirement Program for Salaried Employees, 740 F. 2d 454, 456 (6th Cir. 1984), cert denied 469 U.S. 1109, 105 S. Ct. 786, 83 L. Ed. 780 (1985). The Moore court explained: "court[s] may review the administration of a pension fund. . . [h]owever, review of a plan's provisions for reasonableness is improper." Id. at 456 n. 4 (emphasis in original); see also Musto, 861 F. 2d at 911 ("There is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be. A company acts as a fiduciary in performing the first task, but not the second."). Hence, pure business decisions are not governed by fiduciary standards. Berlin v. Michigan Bell Telephone Co., 858 F.2d 1154, 1163 (6th Cir. 1988).

The defendant argues that Section 404 of ERISA does not apply to "settlor" functions of fiduciaries. The plaintiffs' argument is that McKinnon was a fiduciary who acted in his own self-interest in not making a contribution to the ESOP trust. This Court concludes that Mr. McKinnon's acts were not in a fiduciary capacity; therefore, he is not liable for the any injuries claimed by the plaintiffs. When officers implement the terms of an existing plan, they act as fiduciaries. However, when they form, amend or terminate the plan, they act as the management of the employer making business decisions. Sutter

v. BASF Corp., 964 F.2d 556 (6th Cir. 1992). "[P]ure business decisions are not governed by fiduciary standards." Id. at 562 citing Berlin, at 1163.

Mr. McKinnon's acts of which the plaintiffs complain are concerned with the decision not to contribute to the ESOP plan for the year 1987. The decision to make a contribution to an ESOP plan is essentially a matter of business judgment, a choice which the Board could make using its full discretion under Section 4.02 of the Plan. This business decision of the Board does not fall under the fiduciary duties outlined in ERISA.

The plaintiffs argue that the decision not to contribute to the plan was motivated by the Board's self-interest. However, this Court is not concerned with the motives of a Board of Directors regarding their contribution to an ESOP plan where they have full discretion under the plan to contribute or not. A party's motivation is irrelevant in determining fiduciary conduct. The function served by the act, and not the motivation behind the act, determines whether the act was performed in a fiduciary capacity. Bryant v. Food Lion, Inc., 774 F.Supp. 1484, 1493 (D.S.C. 1991). Furthermore, the Food Lion Court stated, "[r]egardless of what this Court's opinion may be of the propriety of this motivation, the law holds that the motivation of a plan settlor is not to be tested against fiduciary standards and is not subject to judicial second guessing. Id. at 1494.

The Court further concludes this is not a case of self-dealing as the plaintiffs suggest under ERISA §§ 406 (b)(1) and (2). Section 406 is limited to the conduct of a fiduciary in transactions involving the plan and the fiduciary. The plaintiffs argue that "the trustee violates his duty to the beneficiary not only where he sells trust property to himself individually, but also where he uses the trust property for his own purposes." Restatement (Second) of Trusts § 170, comment 1 (1959). Most assuredly, McKinnon did not sell anything belonging to the ESOP Trust to himself, nor can it be said that he used any property of the trust for his own benefit. Again, any decision to

liquidate trust assets was made by an outside investment banking concern, and not by Mr. McKinnon. The fact that Mr. McKinnon and the Board of Directors made a geometric return on their original investment while the ESOP Trust merely doubled its money in the sale to Maxwell is not self-dealing or actionable or actionable under ERISA. Again, as in above, the Board's motive for the lack of contribution is irrelevant.

Therefore, the defendant is entitled to summary judgment on claims of the plaintiffs. Leahy v. Trans Jones, Inc., 996 F.2d 136, 138 (6th Cir. 1993) ("if, after being allotted sufficient time for discovery, the opposing party is unable to demonstrate that he or she can produce the evidence required by the criteria of Liberty Lobby, summary judgment is appropriate." (quoting Street v. J.C. Bradford & Co., 886 F.2d 1472, 1478 (6th Cir. 1989)). The case against the defendant Donald H. McKinnon is therefore ordered dismissed. There being no additional defendants, this case is closed.

It is so ordered this 28 day of April, 1994.

/s/Odell Horton
ODELL

HORTON, JUDGE

UNITED

STATES DISTRICT COURT

No. 95-1492

Supreme Court, U.S.
FILED
APR 17 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ERNEST L. AKERS, *et al.*,

Petitioners,

vs.

VALFRID E. PALMER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS

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Counsel for Respondents
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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the court of appeals, in affirming the district court's granting of summary judgment, correctly held that Defendants' actions in creating and establishing the terms of an ESOP constituted purely business decisions made in the course of performing "settlor" functions, not actionable under ERISA.

PARTIES

Petitioners' listing of the more than 200 Appellants before the Sixth Circuit is incorrect and incomplete.

Petitioners' listing of the Appellees is also incorrect. The correct listing is: Valfrid E. Palmer, Francis J. Comiskey, Donald H. McKinnon, Eugene Callan, William Milanese, Edward Gold, Robert Fuller, Louis Ferrara, Kenneth Easterday, Ron Cole, M. Farkas, D. Daniels and Alco Gravure Industries, Inc.

STATEMENT UNDER RULE 29.6

Respondent Alco Gravure Industries, Inc. is indirectly a wholly-owned subsidiary of Quebecor Printing Inc., a publicly-owned Canadian corporation.

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STATUTES INVOLVED

Besides 29 U.S.C. § 1104(1) (quoted at Petition, 2), the Sixth Circuit opinion at issue here involved 29 U.S.C. § 1106(b), which provides, in pertinent part, as follows:

> A fiduciary with respect to a plan shall not --
>
> (1) deal with the assets of the plan in his own interest or for his own account, [or]
>
> (2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. . . .

29 U.S.C. §1106(b)(1)(2)(1988).

No. 95-1492

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

Ernest L. Akers, et al.,

Petitioners,

vs.

Valfrid E. Palmer, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS

Respondents, Valfrid E. Palmer, Francis J. Comiskey, Donald H. McKinnon, Eugene Callan, William Milanese, Edward Gold, Robert Fuller, Louis Ferrara, Kenneth Easterday, Ron Cole, M. Farkas, D. Daniels and Alco Gravure Industries, Inc., submit this Brief in Opposition to

the Petition for a Writ of Certiorari. For the reasons set forth below, this Court should deny the Petition.

COUNTERSTATEMENT OF THE CASE

(A) Course of Proceedings Below

The opinion of the Sixth Circuit at issue here arises out of two cases consolidated below. The older of the two cases, *Akers v. Palmer* (District Court Case No. 91-2054 H/B; Appellate Court Case No. 94-5740), was filed on January 14, 1991 ("*Akers I*"). In *Akers I*, the Petitioners alleged that they were former employees of Alco Gravure, Inc. ("Alco") who were participants in the Alco ESOP. They asserted claims for violation of Sections 404 and 406(b)(1) and (2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1104 and 1106(b)(1) and (2)(1988), against Defendant McKinnon and the other members of the Board of Directors of Alco Gravure Industries, Inc. ("Alco Industries"), as well as Alco itself and other Defendants not pertinent here. (JA[1] 13.)

All the Defendants in *Akers I*, except Defendant McKinnon, were dismissed for failure to serve process. This Order of dismissal was entered on September 30, 1992.[2] (JA 119.)

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[1] "JA" refers to the parties' Joint Appendix in the court of appeals, a copy of which has been filed with the Clerk of this Court.

[2] Petitioners never challenged this Order on appeal.

On March 25, 1993, Petitioners filed a second action, *Akers v. Alco Gravure Industries Inc.* (District Court Case No. 93-2288 H/N; Appellate Court Case No. 94-5743) ("*Akers II*").

The claims in *Akers II* (as in *Akers I*) arise in the context of the January 12, 1988 sale of Alco Industries. A requirement of the purchaser, for the sale to be effected, was that the ESOP Plan and the ESOP Trust be terminated and that the purchaser be the sole stockholder. These and the other undisputed facts underlying the claims are set forth at pages 4-10 below.

By Order dated September 30, 1993, the district court granted Defendants' motion, dismissing Petitioners' claims in *Akers II* as barred by the statute of limitations. In reaching its decision, the district court held that Petitioners had failed to plead allegations of a "fraudulent scheme" with sufficient particularity.

Under the three-year statute of limitations applicable to non-fraud ERISA claims, the Petitioners' claims were untimely. (JA 308.)

On Petitioners' Motion For A New Trial Or To Alter Or Amend The Judgment pursuant to Fed. R. Civ. P. 59, by Order dated November 17, 1993, the district court reinstated *Akers II* as to McKinnon, noting that, since he had been served with process in *Akers I*, the limitations period had been tolled as to him. The Order went on to consolidate *Akers I* and *Akers II* as concerning identical questions of law and fact. (JA 444.)

On February 14, 1994, McKinnon, being the only remaining Defendant in the consolidated action, filed a Motion for Summary Judgment. (JA 125.) In his motion, McKinnon contended that Petitioners failed to show any genuine issue of material fact which would warrant a trial. By Order dated April 28, 1994, the district court granted summary judgment in favor of McKinnon and closed the case. (Petition, A-13 to A-23.)

Petitioners appealed the district court's granting of summary judgment for failure to state a claim under ERISA.[3] On December 11, 1995, the Court of Appeals for the Sixth Circuit affirmed, holding that Petitioners had failed to state a claim under ERISA, because the transactions challenged were not fiduciary acts covered by the statute.[4] (Petition, A-2.)

(B) Statement of Facts

In their statement of facts, and throughout their argument for granting the writ (Petition, 4 to 13), the Petitioners misrepresent the facts in this case by collapsing events which occurred at different times and by misstating or omitting essential details. The following is the accurate statement of facts which was expressly admitted by Petitioners in responding to McKinnon's Statement of

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[3] Petitioners also appealed the district court's dismissal of their Complaint for failure to plead fraud with particularity, and the Court's denial of relief from judgment under Fed. R. Civ. P. 59(e).

[4] Because it found that Petitioners failed to state a claim under ERISA, the court did not address the remaining procedural aspects of Petitioners' appeal. (Petition, A-2, n. 1.)

Material Facts submitted on summary judgment to the district court. (JA 132 to 138; JA 453 to 454.)

Alco Industries is a Delaware corporation which was organized in March 1981. In April 1981, 2,600 shares of Alco Industries common stock, constituting all of the outstanding stock of the corporation, were sold to eleven founding individuals at $60 per share. Defendant McKinnon was one of the eleven individuals.

Under Alco's purchase plan and as a condition to the financing, the primary financing bank required the company to form an ESOP.[5]

Alco is a wholly-owned subsidiary of Alco Industries. On May 13, 1981, Alco acquired through merger a printing company, a subsidiary of Macmillan, Inc.

Later in 1981, Alco Industries and Alco established the ESOP Plan and the ESOP Trust (together, the "ESOP") as a stock bonus plan. Virtually all employees of the Macmillan subsidiary after the merger with Alco were eligible participants in the ESOP.

The ESOP Plan and Trust were embodied in and governed by separate written instruments:

(a) Under Section 12.03 of the ESOP Plan, Alco Industries had the right, at any time, to terminate the ESOP.

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[5] This fact is undisputed (*see* Petition, A-3), but it was not in the statement of facts which was submitted by McKinnon to the district court.

(b) Section 11.05 of the ESOP Plan provided that the ESOP Plan would be administered by a committee composed of individuals appointed by the Board of Directors (the "ESOP Committee"). Under Section 5.04 of the ESOP Plan, the ESOP Committee had the authority to direct the Trustee to sell shares of Company stock.

(c) Under Section 4.02 of the ESOP Plan, the funding of the ESOP was by discretionary employer contributions; there was no requirement under the ESOP Plan that the employer make any contribution to the ESOP. Any contribution by the employer was at the discretion of the employer, exercised by its Board of Directors. The ESOP Plan did not require the Board of Directors to advise participants whether, or in what amount, it intended to make a contribution to the ESOP.

(d) Under Section 4.03 of the ESOP Plan, no participant therein was permitted to make any contribution to the Plan.

All contributions to the ESOP that were ever made were made in newly-issued stock of Alco Industries, the number of shares determined by a valuation of their fair market value made by independent appraisers in accordance with the provisions of the Internal Revenue Code and Revenue Rulings thereunder. *These shares constituted the only shares of Alco Industries stock which the ESOP Trust ever held.*

Historically, the Board decided to make a contribution after the close of Alco Industries' fiscal year (which ended December 31) for that fiscal year; for example, in February 1982, a contribution to the ESOP was made for 1981.

In every year for which contributions were made, 1981 through 1986, Alco Industries had a net operating profit.[6]

Alco Industries' certified financial statement prepared by Arthur Andersen & Co. shows that, for 1987, Alco Industries did not have a profit; it had a net loss before taxes of $518,112.

The Board declined to make a contribution to the ESOP for the year 1987.

In 1987, a subsidiary of Maxwell Communications, Inc. ("Maxwell") contacted the Board of Directors of Alco Industries and offered to purchase all of the outstanding capital stock of Alco Industries from its shareholders.

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[6] The following contributions were made to the ESOP (in round figures):

For the year ended 12/31	*Pre-tax, pre-contribution profits (losses)*	*Amount of ESOP Contributions*	*No. of Shares Contributed*
1981	$ 2,600,000	$2,491,200	288
1982	$ 3,377,000	$3,007,000	299
1983	$ 8,703,000	$5,326,000	339
1984	$11,349,000	$6,032,000	349
1985	$ 8,026,000	$4,605,000	277
1986	$ 1,618,000	$ 319,000	22
1987	($518,112)	-0-	-0-

(JA 157.)

The senior management of Alco Industries was in favor of such a sale and negotiated with Maxwell for the highest possible price. One of the terms insisted on by Maxwell was that upon closing, the ESOP Plan and Trust be terminated and there be no minority stockholders remaining.

A letter of intent was entered into with Maxwell at the end of October 1987 contemplating a closing prior to December 31, 1987. On October 30, 1987, Valfrid Palmer, who was at the time President of Alco Industries, issued a memorandum addressed to Alco's employees (including Petitioners) informing them of the proposed purchase by Maxwell and the reasons why the proposal was being considered.

At that time, McKinnon was a member of the Board of Directors of Alco Industries together with Palmer and Francis Comiskey, Jr. (who were officers), and Messrs. Eugene Callan, a banker, and William Flynn, the Chairman of the Board of Mutual of America Life Insurance Company. Callan and Flynn were outside directors and did not own any Alco Industries shares.

Also at that time, McKinnon was a member of the ESOP Committee together with Palmer and Comiskey. All three were major shareholders of Alco Industries and stood to profit if the sale to Maxwell were consummated; on November 5, 1987, McKinnon, Palmer and Comiskey resigned from the ESOP Committee. They were replaced by Callan and Flynn.

As sole members of the ESOP Committee, Callan and Flynn engaged separate legal counsel and retained A.G. Edwards & Sons Inc. ("A.G. Edwards"), an independent

investment banker, to evaluate the fairness of Maxwell's offer. The opinion of A.G. Edwards was that the price Maxwell was prepared to pay was fair; the opinion showed that Maxwell's price was more than twice the fair market value of the shares. Based on this opinion and in accordance with the provisions of the ESOP Plan, the ESOP Committee instructed the Trustee to accept the offer of Maxwell and to sell to Maxwell all of the Alco Industries stock owned by the ESOP Trust.

On December 15, 1987, Palmer issued a memorandum addressed to Alco's employees (including Petitioners) informing them that agreement was reached on all major open items in the sales contract with Maxwell and that the sale of stock was scheduled to take place during the first week of January.

At no time was any corporate action taken resulting in the sale of shares to Maxwell which required a vote by the stockholders. Each stockholder of record made its own determination whether to sell its shares to Maxwell. At no time was there any issue presented to the participants in the ESOP for their vote with respect to the sale to Maxwell, nor was there any corporate action taken that would require their consent.

The sale to Maxwell by every single stockholder of Alco Industries (including the ESOP Trust) was consummated effective January 12, 1988. All shareholders in Alco Industries received precisely the same amount for their shares ($23,311 per share).

In January 1988, the ESOP was formally terminated in accordance with its terms. The ESOP Trust thereafter distributed to all participants, including Plaintiffs, their pro-

rata share of the proceeds of the sale of the ESOP Trust's stock to Maxwell.

REASONS FOR DENYING THE WRIT

THE DECISION OF THE SIXTH CIRCUIT IN THIS CASE IS NOT IN CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS.

A. Petitioners Mischaracterize the Decision of the Sixth Circuit as Insulating Self-dealing by ERISA Fiduciaries From Judicial Review.

Petitioners' do not accurately present the holding of the Sixth Circuit. Contrary to the mischaracterization in the Petition, the Sixth Circuit did not sanction self-dealing by ERISA fiduciaries, did not hold that a self-dealing transaction is acceptable where the ESOP makes a profit, and did not adhere to any notion that self-dealing by a fiduciary is insulated from judicial review. Rather, the Sixth Circuit found that "none of the actions of which [Petitioners] complain is a fiduciary act under ERISA." Indeed, the Court explicitly concluded that the conduct of McKinnon was not fiduciary and that the Petitioners' characterization of the actions of the Alco Board as fiduciary, because the Board supposedly benefitted itself "at the expense" of the ESOP beneficiaries, was factually wrong as well as erroneous in law. 71 F.3d at 232. Petitioners' characterization of the decision rests on mere assertions (71 F.3d at 230; Petition A-

7) that Petitioners cannot prove because they directly contradict the undisputed, admitted facts in this case. A fair reading of the Sixth Circuit opinion confirms this.

For example, in a futile attempt to concoct a transaction covered by ERISA, Petitioners argue that the ESOP *purchased* shares and that the purchase was part of Defendants' buyout from Macmillan in 1981. (Petition, 8.) But as the Sixth Circuit, finding that argument "strained, disingenuous, and wholly meritless," correctly noted,

> The ESOP did not "purchase" anything, and plaintiffs offered no evidence other than their own assertions to support their claim. Rather, the shares transferred to the fund served as an initial contribution [made in 1982], giving the ESOP benefits worth over $2,400,000. The trust acquired no debt to obtain the shares, nor were there any plan "assets" used to "purchase" the shares. To be sure, the shares themselves constituted the original plan assets. *They were, in essence, a gift from the employer to the employees.*

71 F.3d 226, 230 (6th Cir. 1995); Petition, A-6 (emphasis added).

Petitioners place great weight on their argument that it must have constituted self-dealing, and thus be a breach of fiduciary duty under ERISA, for the Respondents to have made a geometric return on their investment while the ESOP "merely doubled its money." The Petitioners disregard completely the finding below that neither they nor any other participant in the ESOP made any investment whatsoever in

the ESOP, and that McKinnon and the other founding individuals are the only ones who ever paid *anything* for their shares in Alco Industries.

Moreover, the purchase of Alco Gravure shares by McKinnon and the other founders in 1981 took place before the ESOP was established or anyone appointed its fiduciary and long before any contribution was made by the employer in 1982. As the Sixth Circuit recognized,

> Plaintiff would have this Court apply ERISA to company actions *prior* to the creation of an employee benefit plan. We have found no authority, nor have plaintiffs offered any, to support such an extension of ERISA.

Id. (emphasis in original).

The court of appeals specifically rejected Petitioners' allegation, repeated before this Court, that because McKinnon was a founding member of Alco and voted to create the ESOP and to fund it with 288 shares valued at their fair market value, he thereby was a fiduciary:[7]

> Plaintiffs advance no authority justifying extending ERISA fiduciary standards to govern the conduct of a company in its decision as to whether and on what terms it should create an employee benefit plan.

71 F.3d at 231; Petition, A-10.

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[7] The valuation mandated by the IRS for contributed shares reflects the limitation on available deductible expenses for the employer. *See* I.R.C. § 404. It in no way indicates that a sale of shares to the ESOP has taken place.

As the court of appeals reasoned,

> Because an employer has no affirmative duty to create a benefits plan for its employees, *Moore v. Reynolds Metals Co. Retirement Program*, 740 F.2d 454, 456 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109, 105 S.Ct. 786, 83 L.Ed.2d 780 (1985), only actions respecting the administration or management of plan "assets" are subject to fiduciary standards. *See Musto v. American General Corp.*, 861 F.2d 897, 911 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020, 109 S.Ct. 1745, 104 L.Ed.2d 182 (1989). That is, a company is only subject to fiduciary restrictions when managing a plan according to its terms, but not when it decides what those terms are to be. *Id.* ERISA is simply not involved in regulating conduct affecting the establishment of a plan or with its terms. *Moore*, 740 F.2d at 456. "In particular, courts have no authority to decide which benefits employers must confer upon their employees ...", *id.*, or to review a plan's provisions for reasonableness. *Sutter v. BASF Corp.*, 964 F.2d 556, 562 (6th Cir. 1992). Rather, these decisions should be left to the marketplace or to federal legislation. *Moore*, 740 F.2d at 456. Simply put, "ERISA's concern is with the elements of a plan and its administration *after* it has been established..." *Musto*, 861 F.2d at 912 (emphasis added) (citation omitted).

71 F.3d at 230; Petition A-7.

In no authority cited by the Petitioners has a decision of another circuit been in dispute with the finding of the Sixth Circuit.

B. The Cases From Other Circuits Cited by Petitioners Involve Administration of an ESOP Plan, Including Misuse of ESOP Assets, Which Did Not Occur Here.

The cases cited by Petitioners from other courts of appeals, in particular, *Amalgamated Clothing and Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406 (9th Cir. 1988) and *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978), dealt with transactions involving administration of trust assets, and specifically, misuse of those assets. They are not in conflict with the holding of the Sixth Circuit in this case:

> In this case, there is no allegation that Alco breached its duties to the beneficiaries in its administration of the ESOP.

71 F.3d at 229; Petition, A-6. On the undisputed facts in this case, Petitioners cannot prove any transactions involving the ESOP Trust assets or any facts analogous to the facts of *Amalgamated* or *Eaves*.

The plaintiffs in *Amalgamated* claimed that one of the plan fiduciaries influenced the other plan fiduciaries to use plan assets to acquire shares in two companies he controlled. He then used his control interest to "greenmail" the target companies into buying back their stock from him and the trust at a substantial premium, resulting in the trust having a surplus. Subsequently, he caused the plan to be amended to provide that on termination, any surplus was to be paid to him. Thereafter, he terminated the plan and received the

surplus. Plaintiffs sought to recover the surplus for the plan participants.

Amalgamated did not involve the creation of a plan, but rather the abusive mismanagement of a plan's existing assets. The fiduciary put at risk for his own benefit assets of the plan. Because of the leverage he gained by manipulating the assets of the plan (in being able to greenmail other companies) the individual profited by obtaining premiums attributable to this leverage. Moreover, whereas the plan initially was entitled to the benefit of any premium generated by such dealings, the fiduciary caused the plan to be amended to provide that such premium would be paid to him personally. The court's decision is replete with references to the disgorgement of ill-gotten profits, constructive trusts to protect the beneficiaries, and remediless victims of the fiduciary's fraud. In a word, the *Amalgamated* case, unlike the instant case, involved the mismanagement of plan assets rather than management's ability to create and terminate a plan without becoming an ERISA fiduciary.

Similarly, *Eaves* involved transactions with an ESOP trust. The defendant ESOP trustee, with the intent to obtain sole control of a company (whose assets he later used for his other businesses), caused the trust to purchase 97% of the shares of the company. Through such abuse of the trust assets coupled with his purchase of the remaining shares of the company with funds he borrowed from the company, the defendant obtained the legal title to all of the outstanding shares of the company thereby effecting a buyout for his benefit. The court concluded that, by acting in his own interest rather than the interests of the trust, the trustee violated his fiduciary duty to the trust. *Eaves*, 587 F.2d at 459-60.

The Tenth Circuit in *Eaves* also considered whether that same defendant, by recommending, designing and implementing a change from a rich profit-sharing plan to an ESOP, was bound by fiduciary standards. The Tenth Circuit concluded that he was, because his conduct amounted to rendering investment advice, one of the express circumstances defining a fiduciary under ERISA (*see* 29 U.S.C. §1002(21)(A)(1988)) and that, being a statutory fiduciary, his advice was not for the exclusive purpose of providing benefits to participants, but to facilitate defendants' control of the company. *Eaves*, 587 F.2d at 458. This case follows the same line of judicial reasoning as was followed in *Amalgamated*: the mismanagement of plan assets by a fiduciary is not a purely settlor function and is not beyond ERISA liability.

This Court as recently as four weeks ago recognized the significance of the distinction between performing purely settlor functions and the management or administration of plan assets within the meaning of ERISA. In *Varity Corp. v. Howe*, 64 U.S.L.W. 4138 (1996), this Court rejected the argument of the employer-administrator that it was not acting as a fiduciary when it significantly and deliberately misled the beneficiaries of the plan to transfer their interests to an insolvent company. 64 U.S.L.W. at 4142. The district court had found that the employer-administrator intentionally deceived participants in the plan by connecting statements concerning plan benefits with statements known to be false concerning the viability of the insolvent transferee company. This Court concluded that this conduct constituted the administration of the plan rather than the employer's performance of a purely settlor function. Such conduct was fiduciary. The employer-administrator was exercising "discretionary authority" respecting the plan's "management" or "administration" when it misled the plan beneficiaries. *Id.*

The Court then proceeded to consider the requirement of ERISA that a fiduciary "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries" (29 U.S.C. §1104(a)(1988)). It concluded that the employer-administrator had not done so. 64 U.S.L.W. at 4142.

Varity, like *Amalgamated* and *Eaves* involved administration of plan assets, and not purely settlor functions. These decisions do not conflict with the decision of the Sixth Circuit in this case. As noted above, the Sixth Circuit explicitly found that there was no allegation that Alco breached its duties to the beneficiaries in its administration of the ESOP. 71 F.3d at 229; Petition, A-6. The court held that the Petitioners' characterization of the actions of Alco's Board as fiduciary conduct (because the Board allegedly somehow benefited itself at the expense of the trust beneficiaries) was factually erroneous. 71 F.3d at 226; Petition, A-6. It rejected Petitioners' principal argument that self-dealing was somehow involved (and thus a breach of fiduciary duty under ERISA) for the founders to have made a geometric return on their investment while the ESOP merely doubled its money -- seven years after the Alco established the ESOP. 71 F.3d at 229; Petition, A-5.

CONCLUSION

Because of the absence of conflict among the circuits, we request that the Petition for Certiorari be denied.

Respectfully submitted,

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